SURVEY OF RECENT DECISIONS

OF

THE HONORABLE PAUL J. KILBURG

U.S. Bankruptcy Court
Northern District of Iowa

October 24, 2003 – October 20, 2004

Prepared by

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Law Clerk

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The case summaries are categorized to correlate with the Key Number Classification of West's Bankruptcy Digest. West's key numbers are included in the topic headings below. Summaries of prior decisions (April 23, 1993 to present) are available on our web site, www.ianb.uscourts.gov.

I. IN GENERAL, 2001-2120

C. Jurisdiction, 2041-2080

FL Receivables Trust 2002-A v. Gilbertson Restaurants, Inc. (In re Gilbertson Restaurants, LLC, et al) — 28 U.S.C. § 2201
No. 04-00385, Adv. 04-9061, Ch. 11, Oct. 12, 2004

The Trust includes Burger King Corporation ("BKC") as a defendant in an action to determine the security and priority of its claims and liens. The Trust seeks declaratory judgment against BKC based on BKC's statement that it was investigating causes of action against the Trust and intended to fully prosecute any and all claims "in connection with the actions, conduct and threats of [the Trust] and its representatives." BKC seeks dismissal, asserting there is no "case or controversy" as required by the Declaratory Judgment Act and Article III of the Constitution. HELD: The Court has substantial discretion in determining whether to dismiss a declaratory judgment action. At present, it is impossible to state that a cause of action will ever accrue. The current state of affairs does not give rise to an "actual controversy" between the Trust and BKC. Dismissal is granted for lack of subject matter jurisdiction. BKC may chose to request Rule 9011 sanctions against the Trust.

Central State Bank v. McCabe (In re Lawrence & Janet McCabe) — 11 U.S.C. § 363(f)
No. 02-00250, Adv. 03-9122, 302 B.R. 873, Ch. 7, Dec. 10, 2003 — 28 U.S.C. § 157(a)

Bank brought motion for partial summary judgment seeking order requiring fellow creditor to release its liens on real property that was being developed by a Trust in which debtor allegedly had an interest. HELD: Court had "related to" jurisdiction to consider motion for partial summary judgment brought by Bank. Creditor was not estopped by consent order from refusing to release its liens.

D. Venue; Personal Jurisdiction, 2081-2100

McAllister v. Granger State Bank (In re McAllister) — 28 U.S.C. § 1452
No. 04-02249, Adv. 04-9115, 2004 WL 2034903, Ch. 13, Aug. 11, 2004

Debtors filed a Notice of Removal of their state court action. The Bank filed a Motion to Remand the proceeding to Iowa District Court, asserting that adequate equitable grounds exist for this Court to remand the case, as well as a parallel case, to the state court. HELD: Issues in the cases have been extensively litigated in Iowa District Court. Adding a third tribunal would constitute a duplicative and uneconomical use of judicial resources. Motion to Remand is granted.

II. COURTS; PROCEEDINGS IN GENERAL, 2121-2200

B. Actions and Proceedings in General, 2151-2180

Eide v. Haas (In re H & W Motor Express Co.) Fed. R. Bankr. P. 7055
No. 02-02017, Adv. 04-9106, Ch. 7, Sep. 15, 2004

Default judgment was entered against defendants. Trustee served the complaint by mail to a marina address where Defendants keep a boat and have telephone service, but do not reside. Defendants seek to vacate default and request sanctions against Trustee. HELD: If a defendant is improperly served, the court lacks jurisdiction and default judgment is void. Default judgment should be vacated. Trustee acted in good faith and sanctions are not appropriate.

III. THE CASE, 2201-2360

C. Voluntary Cases, 2251-2280

In re Lance & Susan Schaefer 11 U.S.C. § 707
No. 03-04583, Ch. 7, July 29, 2004

Debtors seek voluntary dismissal of their Chapter 7 petition. Trustee has filed a complaint to deny discharge and avoid fraudulent transfers. Trustee argues dismissal would allow Debtors to dispose of property with no benefit to creditors. HELD: Debtors have failed to show cause for dismissal. Dismissal would prejudice creditors, as they would not receive the benefit of avoidance of transfers.

In re Mark & Angela Wessels 11 U.S.C. § 707(b)
No. 04-00599, 311 B.R. 851, Ch. 7, June 18, 2004

U.S. Trustee moves to dismiss Chapter 7 case for substantial abuse. HELD: Trustee met his burden of proving that granting debtors Chapter 7 relief would be a substantial abuse of provisions of Bankruptcy Code. Debtors' expenses are high. They are overpaying secured debt.

IV. EFFECT OF BANKRUPTCY RELIEF; INJUNCTION & STAY, 2361-2490

B. Automatic Stay, 2391-2420

In re David Richard Calhoun 11 U.S.C. § 109(a)
No. 04-00859, 312 B.R. 380, Ch. 7, June 24, 2004 § 302(a)

A creditor filed a motion for a determination of what entities were Chapter 7 debtors protected by automatic stay. HELD: Only the individual Chapter 7 debtor is protected by the automatic stay. Debtor listed names of limited liability companies in which he allegedly had some interest as other names by which

he was known on his bankruptcy petition. This does not include these limited liability companies as debtors on this bankruptcy petition and they are not protected by the automatic stay.

C. Relief from Stay, 2421-2460

In re Gilbertson Restaurants LLC — 11 U.S.C. § 362(d)
No 04-00385, 2004 WL 1724876, Ch. 11, May 20, 2004

FL Receivables Trust requests relief from the automatic stay to foreclose its equipment liens or receive payments equal to scheduled loan payments. Debtor asserts the equipment is not losing value, is well maintained and is insured. It asserts that value will reduce greatly if the Trust is allowed to foreclose. HELD: The record does not show the present value of the equipment. Tax depreciation schedules are not proof of value. Debtor's offers of regular maintenance, continuing insurance and $2,000 per month are adequate protection.

In re Paul and Janice Kramer — 11 U.S.C. § 362(a)
No. 03-02832, Ch. 7, Nov. 10, 2003

The United States seeks relief from the automatic stay to allow a judicial foreclosure sale and related proceedings ordered by the U.S. District Court. Na-Churs Plant Food Co. seeks to join in the relief requested by the United States. Debtors resist. HELD: The United States has meet its burden to prove that Debtors have no equity in the real estate which is subject to sale. Debtors' names are not on the title to the real estate. The value of the real estate is much less than the amount of the liens attached to it. Debtors' prospects of reorganization are not in issue in this Chapter 7 case. The automatic stay should be lifted under §362(d)(2). Cause to grant relief from the automatic stay also exists under §362(d)(1). The judgment and Order of Sale of the U.S. District Court are final and not subject to attack in this forum. It is obvious Debtors are attempting to deter the United States and Na-Churs in their bona fide efforts to complete the judicially sanctioned foreclosure sale. The United States has met its burden to show cause exists to lift the automatic stay under §362(d)(1).

D. Enforcement of Injunction or Stay, 2461-2480

In re Loren & Patricia Reisen — 11 U.S.C. § 362(b,h)
No. 03-01999, 2004 WL 764628, Ch. 7, March 4, 2004

Postpetition, Wal-Mart turned an insufficient funds check over to the Dubuque County Attorney's Bad Check Restitution Program which sent a demand letter to Debtor . After receiving this letter, Debtor filed a Motion for Sanctions asserting that Wal-Mart and the Dubuque County Attorney's Bad Check Restitution Program violated § 362. HELD: Any violation of the automatic stay by Wal-Mart was technical in nature and inadvertent. American Corrective Counseling Services' contacts with Debtor during the automatic stay under § 362 were inadvertent and were done without any notice of the pendency of Debtor's bankruptcy

case. No relief is warranted under the original motion (§ 362). However, relief may exist under the unpled § 524(a) and Debtor is given two weeks to amend to add such an allegation.

Lankford v. Advanced Equities, Inc. (In re John & Sha Lankford) 11 U.S.C. § 362(h)
No. 03-02885, Adv. 03-9221, 305 B.R. 297, Ch. 7, Jan. 20, 2004

Chapter 7 debtor-tenants filed adversary complaint, seeking damages for former landlord's alleged stay violation. HELD: Landlord willfully violated the automatic stay by filing a forcible entry and detainer action against debtors, moving debtors' belongings out of their rental house, and locking them out of the house. Debtors are entitled to actual damages of $750 for injuries caused by their former landlord's loss of or damage to their personal property. Landlord's claim, relating to the costs of clean-up and the eviction proceedings, is void and not collectible. His conduct warrants an award of punitive damages in the amount of $1,000.00

In re Susan & Aaron Joens 11 U.S.C. § 362(h)
No. 03-02077, 2003 WL 22839822, Ch. 7, Nov. 21, 2003

Creditor holding undersecured home equity loan continued to send monthly statements and default notices postpetition. HELD: Creditor's contacts with Debtors postpetition constitute deliberate attempts to collect a debt in violation of the automatic stay. Actual damages of $755 are awarded. Punitive damages are not appropriate in this case.

In re Kevin & Karri Hromidko 11 U.S.C. § 362(h)
No. 03-03544, 302 B.R. 629, Ch. 7, Nov. 21, 2003

Debtor moves for sanctions against creditor and its collection agent for alleged violations of the automatic stay, seeking actual damages, punitive damages, and attorney fees. HELD: Collection agent's postpetition contacts with debtor's employer were willful, supporting sanctions for stay violation. Agent's postpetition contacts were especially egregious, warranting award of $5,000 in actual damages and $5,000 in punitive damages. Debtor is entitled to recover attorney fees.

In re Sharlene See Fed. R. Bankr. P. 9023
No. 03-01975, 301 B.R. 554, Ch. 7, Nov. 20, 2003
aff'd No. C03-151 LRR (N.D. Iowa Apr. 14, 2004)

Debtor filed application for rule to show cause why Bank should not be sanctioned for violating automatic stay. When Bank failed to file responsive pleading or to appear at hearing on debtor's application, the Court, 301 B.R. 549, entered order holding Bank in contempt and awarding damages, including punitive damages in amount of $5,000. Bank moves to alter or amend judgment. HELD: The bank had notice of Chapter 7 debtor's application for rule to show cause why it should not be sanctioned for violating automatic stay. It chose not to appear at the hearing and to wait and see what, if any, sanctions were

imposed. The bank thereby waived its right to complain of punitive and attorney fee awards entered by the Court.

In re Sharlene See — 11 U.S.C. § 362(h)
No. 03-01975, 301 B.R. 549, Ch. 7, Oct. 28, 2003

Debtor applied for order to show cause why Bank should not be sanctioned for its alleged willful violations of automatic stay in connection with garnishment of debtor's wages. HELD: Debtor retained interest in funds that had been garnished prepetition, and could assert Iowa state law exemption therein. Bank violated automatic stay by continuing to garnish Chapter 7 debtor's wages postpetition, and by filing application to condemn garnished funds after debtor filed for bankruptcy relief. The stay violation was "willful," so as to support award against the bank for debtor's actual damages. Circumstances were such as to warrant punitive damages award against the bank in the amount of $5,000.

V. THE ESTATE, 2491-2760

C. Property of Estate in General, 2531-2570

In re Alysia Marburger — 11 U.S.C. § 541
No. 04-02390, Ch. 7, Sep. 27, 2004

Debtor's former fiancé seeks return of Debtor's engagement ring. The engagement was broken off prepetition. HELD: State law governs the resolution of property rights. Under Iowa law, an engagement ring is a conditional gift, which is complete only upon marriage. Debtor must return the ring to her former fiancé.

Iowa Oil Co. v. Citgo Petroleum Corp. (In re Iowa Oil Co.) — 11 U.S.C. § 553
No. 03-00418, Adv. 03-9057, Ch. 11, Dec. 12, 2003
aff'd in part, rev'd in part, and remanded, 2004 WL 2326377 (N.D. Iowa Sept. 30, 2004)

Debtor initiated this adversary proceeding by filing a turnover complaint against Citgo. Debtor demands that Citgo pay over credit card receipts collected by Citgo and owed to Debtor. Citgo asserts that it is not obligated to pay over the funds. Citgo filed a counterclaim alleging that Debtor violated the Lanham Act, 15 U.S.C. §1051 et seq. Debtor denies any violation. Both parties move for summary judgment as to Debtor's turnover complaint. Additionally, Citgo filed a motion for summary judgment on its Lanham Act counterclaim. HELD: Citgo must turn over to Debtor the withheld credit card receipts in which Citgo has an interest inferior to the Bank's perfected security interest. Citgo is not entitled to recoupment from Debtor. Citgo is entitled to immediate injunctive relief under the Lanham Act. An evidentiary hearing is necessary to determine Lanham Act damages, if any.

D. Liens & Transfers; Avoidability, 2571-2600

In re Dino & Dawn Rubino — Iowa Code § 561.21(3)
No. 04-00706, 2004 WL 1701105, Ch. 7, May 28, 2004

Debtors seek to avoid the lien on their homestead arising small claims judgment from creditor's installation of an above-ground pool at Debtors' residence. The issue is whether the pool is an improvement to real property so as to except the debt from the homestead exemption. HELD: The above-ground swimming pool on Debtors' homestead property constitutes an improvement to the real estate. Creditor's judgment was for a debt incurred in installing this improvement. The debt is excepted from Iowa's homestead exemption.

E. Preferences, 2601-2640

Schnittjer v. Adams (In re Bronson) — 11 U.S.C. § 547
No. 03-04491, Adv. 04-9033, 2004 WL 1729450, Ch. 7, July 29, 2004

Trustee filed a complaint to recover transfers made by Debtor to Defendants within one year of Debtor's bankruptcy petition pursuant to 11 U.S.C. § 547(b). Defendants ask the Court to dismiss the complaint or to award summary judgment in their favor. They assert that Trustee's admission of Debtor's lack of insolvency on the dates of the transfers necessitates an award of summary judgment in their favor. HELD: Trustee cannot establish a critical element of its claim, i.e. insolvency at the time of the transfer, based on her admissions. The summary judgment motion must be granted.

VI. EXEMPTIONS, 2761-2820

VII. CLAIMS, 2821-3000

C. Administrative Claims, 2871-2890

In re Tama Beef Packing Inc. — 11 U.S.C. § 503(b)
No. 01-03822, 312 B.R. 192, Ch. 11, June 16, 2004
(appealed to B.A.P., No. 04-6039)

Unsuccessful bidder for Debtor's unexpired lease filed application for payment of administrative expense claim. The Court, 283 B.R. 274, denied the application, and bidder's motion for reconsideration, 284 B.R. 889. Bidder appealed. The Bankruptcy Appellate Panel, 290 B.R. 90, reversed, and the successful bidder appealed. The Court of Appeals dismissed the appeal. On remand, the Court determines reasonableness of fees requested. HELD: Unsuccessful bidder was entitled to industry standard of 3.2% of purchase price of $153,000 as break-up fees and expenses, rather than unreasonable request of 30.7% of purchase price.

D. Proof; Filing, 2891-2920

In re Jerome Reichenbach — 11 U.S.C. § 502(a)
No. 03-03148, 2004 WL 1718090, Ch. 13, May 5, 2004

Creditor objects to exclusion of its claim from Trustee's Report on Claims. It argues that because the Chapter 13 plan specifically provides for its claim, its claim should be deemed allowed. Trustee argues that Creditor did not file a proof of claim by the Bar Date for filing proofs of claim, and that only allowed claims are provided for in the Report on Claims. HELD: Creditor does not have an allowed claim. No formal proof of claim was filed before the bar date. Creditor has not shown that it had any involvement in the bankruptcy case prior to its post-bar date objection to Trustee's Report on Claims. There is no evidence that an informal proof of claim existed prior to the bar date. Despite the Plan provision addressing its claim, Creditor is not entitled to any distributions in the absence of a formal or informal proof of claim.

E. Determination, 2921-2950

In re Wood Floors Import Distributor LLC — 11 U.S.C. § 502
No. 02-04481, 2004 WL 764507, Ch. 7, Feb. 12, 2004

Debtor objected to certain claims. One claim was asserted by a company run by the brother of Debtor's former president. HELD: Debtor's current president denies the former president's assertions regarding the agreed commission rate. The Court notes that these individuals are soon to be divorced. Based on the conflicting testimony, the Court must conclude that Debtor has failed to rebut the presumptive validity of the claims as filed.

VIII. TRUSTEES, 3001-3020

IX. ADMINISTRATION, 3021-3250

A. In General, 3021-3060

In re Thomas Woodward — 11 U.S.C. § 110
No. 04-02290, 314 B.R. 201, 2004 WL 2032317, Ch. 7, Sep. 1, 2004

U.S. Trustee asserts Gary Culver acted as a bankruptcy petition preparer but did not comply with disclosure requirements. HELD: A "mere typist" is a bankruptcy petition preparer. Mr. Culver is required to sign the documents and disclose his name, address and social security number. Fines are imposed. As his services were detrimental to Debtor's discharge, he must turnover entire $350 fee paid by Debtor.

In re John Neal & Debra Martens-Neal — 11 U.S.C. § 722
No. 04-01429, 314 B.R. 198, 2004 WL 2032319, Ch. 7, Aug. 23, 2004

Debtors wish to redeem their 1996 Geo Tracker for $800. The Bank has a security interest in the Tracker. It asserts that Debtors have undervalued the vehicle. HELD: The Court adopts the liquidation analysis to determine redemption value under § 722. This is also known as wholesale, foreclosure or trade-in value. The Court also takes into account other evidence pertinent to value, such as the vehicle's condition, mileage and need for repairs in deciding whether reduction from the liquidation value is appropriate.

C. Debtor's Contracts and Leases, 3101-3130

In re Gilbertson Restaurants LLC — 11 U.S.C. § 365
No. 04-00385, 2004 WL 1724880, Ch. 11, May 25, 2004

Reinhart filed Motion to Compel Assumption or Rejection of Executory Contracts. The sole issue is whether the contracts in question are executory within the meaning of § 365. HELD: On the petition date, Debtors, through the assignment of rights to RSI, and Reinhart had duties and obligations under the agreements with performance remaining due on both sides. These agreements constitute executory contracts within the meaning of § 365.

E. Compensation of Officers and Others, 3151-3250

In re Keith & Jo Ellen Jeanes — 11 U.S.C. § 329
No. 01-00760, 2004 WL 1718131, Ch. 13, July 12, 2004 — Rule 2016
Rule 9023

Debtors' attorney seeks evidentiary hearing and reconsideration of an Order denying his application for compensation and imposing sanctions. HELD: The attorney had sufficient notice that his entire fee was subject to scrutiny and disgorgement. The hearing previously held was his opportunity to present evidence. Additional evidence may not be presented on a motion to reconsider.

In re Keith & Jo Ellen Jeanes — 11 U.S.C. § 330(a)
No. 01-00760, 2004 WL 1718093, Ch. 13, June 17, 2004

Trustee objects to Debtors' attorney's application for additional compensation. HELD: The attorney's most recent billing appears to request fees which have already been denied by the Court. There are many discrepancies among the billings. The attorney failed to disclose an agreement with a third party to pay fees. No further compensation will be allowed. The attorney shall disgorge $3,000 of fees previously approved.

In re Vincent Michels 11 U.S.C. § 330
No. 01-01415, 03-00316, 2004 WL 1718074, Ch. 12, 13, May 10, 2004

Fiegen Law Firm filed a final application for compensation of attorney fees and expenses incurred in connection with Vincent Michels' Chapter 13 and Chapter 12 cases. The application states the Law Firm seeks fees and expenses totaling $40,428.49. The Chapter 12/13 Trustee and the U.S. Trustee filed objections. HELD: The Law Firm failed to properly supervise Debtor's conduct. In so doing, it provided legal services as directed or dictated by Debtor which were inconsistent with the policies and purposes of the Bankruptcy Code. It was unreasonable for the Law Firm to provide legal services to Debtor in proposing unconfirmable plans in the Chapter 13 case and to further file the subsequent Chapter 12 case with a proposed plan which was no better than the Chapter 13 plans and was unconfirmable on its face. The Court previously approved and allowed payment to the Law Firm in the amount of $17,473, of which $16,537 has been paid. The Law Firm may now disburse to itself the further amount of $8,510.14 which it holds in its trust account constituting the remainder of Debtor's retainer. All other fees and expenses requested by the Law Firm for representing Debtor in these two bankruptcy cases are disallowed. The Court disallows $8,500 as a sanction for the Law Firm's withdrawal of this approximate amount from Debtor's retainer without Court approval.

In re Gilbertson Restaurants LLC 11 U.S.C. § 327(c)
No. 04-00385, 2004 WL 1724878, Ch. 11, May 3, 2004
appeal dismissed, ___ B.R. ___, 2004 WL 2309562 (B.A.P. 8th Cir. Oct. 14, 2004)

Creditor FL Receivables Trust alleges that Debtors' applications for authorization of employment of counsel should be denied due to an impermissible conflict of interest between Debtors Gilbertson Restaurants and KC Beaton Holding Company. Debtors assert that counsel are disinterested persons and do not represent interests or entities materially adverse to the estates. HELD: This Court adopts a "wait and see" approach to the potential conflict of interest between Gilbertson and KC Beaton. At this point, no actual conflict has arisen and Debtors have a common purpose. Debtors already have serious financial problems. The additional time and expense of additional counsel are unnecessary at this time. If the potential conflict ripens into an actual conflict, it will be resolved at that time. A preemptive disqualification is not in the best interest of the estates or their respective creditors.

In re RJ Manufacturing, Inc. 11 U.S.C. § 330(a)(1)
No. 01-04214, 2004 WL 764669, Ch. 11, Feb. 26, 2004

Fiegen Law Firm seeks approval of final fees of $30,891.39 for representing Debtor. U.S. Trustee asserts Fiegen must demonstrate that the requested fees and expenses were reasonable and necessary. Debtor objected to settlement of litigation and may have caused other delays in the progress of the case, including delays in filing a Plan of Reorganization. HELD: The Court concludes that Fiegen Law Firm is not entitled to the total fees requested. From the beginning of this case, there has been an inherent conflict between the estate's interests and those of Debtor’s principal, Mr. Rank, regarding the litigation. Debtor's objection that the settlement amount was not high enough appears to have been a manifestation of Mr. Rank's desire to

personally realize value out of the litigation, over and above the amounts needed to satisfy Debtor's creditors. Fiegen's fees for asserting Debtor's objection to the settlement were merely for the benefit of only Debtor or its sole officer and shareholder, Mr. Rank. Furthermore, the objection to the settlement impeded and delayed Trustee's attempts to finalize the litigation and proceed with administering the estate. The Court also finds that certain delays in filing a confirmable liquidation plan are attributable to Debtor and its attorney. As U.S. Trustee argues, a substantial amount of client "handholding" appears to have increased attorney fees beyond that which is reasonable or necessary. Fiegen's compensation is reduced by $12,000.

In re Vincent Michels — 11 U.S.C. § 329
No. 01-01415, 03-00316, Ch. 12, 13, Dec. 15, 2003

After the Court denied confirmation and entered dismissal in Debtor's Chapter 12 case, No. 03-00316, it ordered Mr. Fiegen to file a final application for compensation in the Chapter 13 case, No. 01-01415, an accounting of fees received in that case and an explanation of the "prepetition Chapter 13 fees of approximately $7,000" referred to in the Application to Employ filed in the Chapter 12 case. The Court also ordered Mr. Fiegen to file an itemization of fees and expenses for legal services rendered in the Chapter 12 case. HELD: The Court has jurisdiction to consider allowance and payment of fees to Fiegen as Debtor's attorney in both the Chapter 13 and Chapter 12 cases. The award of interim compensation to Fiegen in the Chapter 13 case is not final and is fully reviewable. Fiegen had no authority to draw down from the January 2003 retainer. If the draw is considered payment of unbilled fees in the Chapter 13 case, these fees were not disclosed to or approved by the Court, making the draw from the retainer improper. If the draw is considered payment of prepetition fees in the Chapter 12 case, it is improper as it occurred postpetition without approval of the Court.

In re John Lund — 11 U.S.C. § 330(a)
No. 00-01683, Ch. 13, Dec. 2, 2003

Attorney Joseph Peiffer filed applications for compensation as attorney for Debtors in this case and three other Chapter 13 cases. These matters were jointly set for hearing. In all four cases, the Law Firm requests approval of additional attorney fees and expenses incurred postpetition, and payment through the Chapter 13 plans. HELD: When seeking compensation beyond the base amount, Chapter 13 debtors' attorneys have the burden to prove reasonableness of the fees requested under §330(a). The Court applies the lodestar analysis, including consideration of the effect that allowance of attorney compensation and payment through the plan will have on distributions to unsecured creditors. Trustee is directed to review fee requests for reasonableness and to file objections when appropriate. Applications for fees should follow the U.S. Trustee guidelines. In this case, the Court concludes Peiffer's hourly rate is reasonable. Considering the circumstances, the number of hours expended is acceptable under the lodestar analysis. The additional fees requested are allowable, to be paid directly by Debtor and not through the Chapter 13 plan.

X. DISCHARGE, 3251-3440

B. Dischargeable Debtors, 3271-3340

U.S. Trustee v. Brewer (In re Brewer) 11 U.S.C. § 727(d)(1)
No. 02-02520, Adv. 03-9204, 2004 WL 1701107, Ch. 7, May 18, 2004

U.S. Trustee alleges that Debtor failed to make a good faith effort to provide Creditor, Debtor's ex-wife, with notice of the bankruptcy case. In affirming the accuracy of his bankruptcy schedules, which contained inaccurate contact information for Creditor, U.S. Trustee asserts that Debtor made a false oath. Debtor argues that he did not have the requisite fraudulent intent to warrant revocation of his discharge. HELD: The burden of proof is upon U.S. Trustee to establish the requisite elements for revocation of discharge. Creditor knew or should have known of the pendency of Debtor's bankruptcy petition no later than two days after its filing. Creditor had adequate time within which to intervene in this bankruptcy proceeding to protect any interests which she might have in Debtor's estate. Her failure to do so was not caused by any acts of Debtor. The complaint requesting denial of discharge is denied.

Schnittjer v. Skillen (In re Skillen) 11 U.S.C. § 727(a)
No. 03-00100, Adv. 03-9118, 2004 WL 764675, Ch. 7, March 26, 2004

Trustee objects to Debtor's discharge, asserting Debtor provided a false oath or account, concealed assets, and transferred or removed assets. Debtor asserts that his actions were based upon innocent misunderstandings and that he did not have the requisite intent to support Trustee's allegations. In addition, Debtor argues that the asset allegedly transferred or removed was not property of the Debtor or the bankruptcy estate. HELD: While Trustee failed to prove intent under the false oath and concealment of stock allegations, Trustee has proved by a preponderance of the evidence that Debtor transferred or removed property of the estate post-petition with fraudulent intent. While denial of discharge is a serious remedy, only deserving debtors receive a fresh start. Debtor's blatant, unexplained disregard for Trustee's clear instructions demonstrates a fraudulent removal or transfer of assets warranting denial of discharge.

U.S. Trustee v. LeBahn (In re Johnathan & Carrie LeBahn) 11 U.S.C. § 727
No. 02-03829, Adv. 03-9062, 2004 WL 726915, Ch. 7, March 2, 2004

U.S. Trustee alleges that Debtor's discharge should be revoked under 11 U.S.C. § 727(d)(1) because Debtor provided a false oath or account, concealed property of the bankruptcy estate, and removed property of the bankruptcy estate. Debtor asserts that his actions were based upon innocent misunderstandings and that he did not have the requisite intent to support the U.S. Trustee's allegations. Debtor did not disclose his interest in a race car. HELD: Trustee has proved by a preponderance of the evidence that Debtor, with fraudulent intent, made false oaths, concealed assets, and removed property of the estate post-petition.. Debtor's actions considered together demonstrate fraudulent intent from the filing of his bankruptcy petition through Trustee's sale of the race car. While the value of the race car to the estate is minimal, Debtor's actions on the whole warrant this serious remedy. Debtor's discharge is revoked.

U.S. Trustee v. Cooper (In re Connie Cooper) Fed. R. Bankr. P. 4004
No. 03-00235, Adv. 03-9166, 302 B.R. 633, Ch. 7, Nov. 21, 2003

U.S. Trustee ("UST") filed objection to Chapter 7 debtor's discharge, and debtor moved for summary judgment on ground that objection was not timely filed. HELD: Unity of interest that existed between UST and the Chapter 7 trustee with respect to preventing discharge of undeserving debtors was such that UST could take advantage of extension granted to Chapter 7 trustee for objecting to debtor's discharge in order to file such an objection outside original 60-day objection period.

C. Debts and Liabilities Discharged, 3341-3410

Limkemann v. U.S. Dep't of Education (In re Limkemann) 11 U.S.C. § 523(a)(8)
No. 02-03338, Adv. 02-9180, 314 B.R. 190, Ch. 7, Aug. 9, 2004

Debtor Mark Allen Limkemann seeks an undue hardship discharge of his student loan obligation. U.S. Department of Education argues that because Debtor is eligible for the Income Contingent Repayment Plan ("ICRP") offered by the William D. Ford Program, he would not suffer undue hardship if required to repay his loans. HELD: Considering Debtor's medical condition, employment history and earning capacity, he is unable to meet his obligations as they become due. He need not forego an undue hardship discharge by virtue of his eligibility for participation in an ICRP.

Savoy v. Balm (In re Balm) 11 U.S.C. § 523(a)(15)
No. 04-00055, Adv. 04-9060, 2004 WL 16377033, Ch. 7, July 2, 2004

Plaintiff seeks to except dissolution debt from discharge. Debtor moves to dismiss the complaint for 1) untimely filing of the complaint, 2) failure to state a statute upon which exception to discharge may be based, and 3) the lack of indemnity or hold harmless language in the dissolution decree. HELD: The complaint was timely filed on the deadline date. It sufficiently states grounds for relief even though it fails to cite § 523(a)(15). Indemnity language is not a prerequisite to excepting dissolution debts from discharge.

First Nat'l Bank v. Fisher (In re Steven Fisher) 11 U.S.C. § 523(a)(2)
No. 03-00811, Adv. 03-9121, 2004 WL 726909, Ch. 7, March 1, 2004

The Bank seeks to except its claim from discharge under § 523(a)(2)(A). It asserts Debtor made charges to a credit card account with no intent to repay. Debtor asserts when he made the charges he intended to repay. HELD: The relevant charges were mostly made at casinos. This was four to six months before Debtor contacted an attorney to file for bankruptcy protection. Debtor admits that he made a mistake in thinking he could win at gambling and get himself out of debt that way. A few months after the casino charges, his wife required surgery and he went on unpaid leave to care for her. On this record, the Court cannot find that Debtor did not have the intent to repay the credit card charges at the time they were incurred. Thus, the Bank's request to except the debt from discharge must be denied.

Kennington v. Johnson (In re Gene Johnson) 11 U.S.C. § 523(a)(15)
No. 02-04336, Adv. 03-9032, 2004 WL 764668, Ch. 7, Feb. 12, 2004

Plaintiff alleges that under § 523(a)(15), certain credit card debts owed by Debtor Gene I. Johnson are not dischargeable. Debtor asserts that the debts are dischargeable because the evidence satisfies at least one of the exceptions to the general rule preventing discharge under § 523(a)(15). HELD: Debtor has met his burden under § 523(a)(15)(A) and has shown by a preponderance of the evidence that he is unable to pay the dissolution debt. Both parties are in precarious financial condition which will be exacerbated by this debt. Plaintiff, however, enjoys a substantially higher standard of living than Debtor. As such, Debtor has also satisfied his burden under § 523(a)(15)(B).

Brown v. Brown (In re Sandra Brown) 11 U.S.C. § 523(a)(15)
No. 01-02347, Adv. 01-9181, 302 B.R. 637, Ch. 7, Nov. 24, 2003 § 727(a)(4)

Chapter 7 debtor's former husband brought adversary proceeding to deny debtor's discharge or, in the alternative, to except specific property settlement debt from discharge. HELD: Debtor's alleged false statement under oath in dissolution proceedings occurring roughly four months prior to petition date, that she did not intend, upon completion of dissolution proceedings, to file for bankruptcy relief, did not "relate materially to bankruptcy case," and did not provide basis for denial of debtor's discharge. Debtor failed to satisfy her burden of showing that she did not have ability to pay her divorce-related property settlement obligation to her former husband. The debt is not dischargeable under the inability-to-pay theory. Debtor also failed to satisfy her burden of proof under benefits/detriments prong of the dischargeability exception.

XI. LIQUIDATION, DISTRIBUTION, AND CLOSING, 3441-3460

XII. BROKER LIQUIDATION, 3461-3480

XIII. ADJUSTMENT OF DEBTS OF A MUNICIPALITY, 3481-3500

XIV. REORGANIZATION, 3501-3660

XV. ARRANGEMENTS, 3661.100-3661.999

XVI. COMPOSITIONS, 3662.100-3670

XVII. ADJUSTMENT OF DEBTS OF FAMILY FARMER, 3671-3700

B. The Plan, 3681-3700

In re Robert & Nancy Richards — 11 U.S.C. § 1225
No. 03-02487, 2004 WL 764526, Ch. 12, Apr. 2, 2004

The Bank objects to Debtors' Amended Chapter 12 plan regarding feasibility of the plan and the appropriate treatment of the Bank's secured claim. The Bank wishes to protect its current equity cushion in collateral and reduce the length of payments in certain categories of its secured claim. It challenges Debtors' income and expense projections, and their ability to make plan payments. HELD: The Bank is entitled to retain its liens and receive the present value of its claims under § 506(b). It is not entitled to additional protection of its equity cushion. The Court concludes that the Plan's proposed duration of payments for all categories of the Bank's secured claim is acceptable under § 1225 and § 1222(b)(9). Debtors have met their burden to prove by a preponderance of the evidence that the Plan has a rational likelihood of success and they will be able to perform as a practical matter.

XVIII. INDIVIDUAL DEBT ADJUSTMENT, 3701-3740

XIX. REVIEW, 3741-3860

B. Review of Bankruptcy Court, 3761-3810

In re Vincent Michels — Fed. R. Bankr. P. 8005
No. 03-00316, Ch. 12, Oct. 23, 2003

Debtor requests a stay pending appeal of the order denying confirmation of his Chapter 12 plan. HELD: The Court has the discretion to require Debtor to post a bond. However, it may be more appropriate to require Debtor to make payments to the Bank in the form of "adequate protection" pending this appeal. While the Court feels that this appeal is meritless, the payment of $2,500 per month by Debtor directly to the Bank can effectively defray any damages to the Bank during the relatively brief appeal period.

XX. OFFENSES, 3861-3863